In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1570

STATE OF KANSAS
Petitioner,

vs.

HAL FARHA, GERALD FARHA, PHIL RAZOOK, JAMIE THOMPSON, JOHN D. KNIGHTLY, JR., GRANT PARSONS, PETE CHRISTOPHER, and HERBERT COHLMIA,
Respondents.

STATE OF KANSAS,
Petitioner,

vs.

JOAN SOLLS, RUSSELL ADAMS, and FREDERICK MELZER,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

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JURISDICTION

Petitioner has failed to properly invoke the jurisdiction of this Court under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

I. May an unconstitutional state statute be treated as an enabling act, authorizing state officials to apply to state courts for electronic search warrants pursuant to 18 U.S.C. §§2510-2520?

II. Does an unconstitutional state statute authorize the oral delegation by an Attorney General to any Assistant Attorney General to apply for an electronic search warrant?

III. Is this matter properly subject to review by the Supreme Court of the United States?

STATEMENT OF THE CASE

Respondents, in order to save time and length, herewith adopt the Statement of Facts presented in the Petition for Writ of Certiorari with the following additions, clarifications and corrections.

A. Statement of Facts

Five electronic search warrants and three extension orders were issued between October 24, 1972, and July 2, 1974. All of the search warrants and extensions, with the exception of the electronic search warrant on July 2, 1974, were issued pursuant to and solely under the authority of K.S.A. 1971 Supp. 22-2513 (repealed and superseded by K.S.A. 1974 Supp. 22-2514, et seq., effective July 1, 1974). Following the interception and seizure of conversations under the electronic search warrants of October and November of 1972, respondents Gerald Farha and Hal Farha were arrested and charged with commercial gambling and conspiracy on December 1, 1972. Inventories of the intercepted conversations were filed and served on Respondents Farha on December 20, 1972. Inventories were never served upon any other parties to this action, nor was any determination ever made by the issuing judge that, in the interest of justice, other parties should or should not be served with inventories of the intercepted conversations. *State v. Farha,* 218 Kan. 394, 396, 409, 544 P.2d 341, (1975). (Petition, App. A5, A27)

While the above action was pending against the Farhas in Sedgwick County, an Assistant District Attorney received

an anonymous phone call regarding gambling activities in October of 1973. Although the Kansas Supreme Court found this to be independent, it did not find, as alleged by Petitioner, that it was "without prior knowledge" of the October and November, 1972 interceptions. (Petition, p. 7)

Petitioner states that in connection with the application for electronic search warrant on December 13, 1973:

> "The Court further ordered that the wiretaps not cease at the conclusion of the first conversations intercepted." (Petition, p. 8)

The specific ruling was more broad than this simple conclusion and actually stated that:

> "The surveillance not be terminated when the first conversation was seized." *State v. Farha,* supra, p. 397. (Petition, App. A46)

and purported to give authority to the District Attorney of Sedgwick County, Kansas to reapply for an extension of the December 13, 1973, order prior to its termination. This reapplication was made and granted on December 19, 1973, only six days after the issuance of the Court's original order.

It is incorrectly alleged on Page 8 of the Petition that:

> "Each application and electronic search warrant order involved in the two December, 1973, and the two January, 1974, intercepts complied with the requirements of 18 U.S.C. §§2510-2520." (Petition, p. 8, ¶3)

Neither the District Court nor the Supreme Court entered such a finding. Both the trial court and the Supreme Court of the State of Kansas held that the Kansas statute was unconstitutional and did not meet the standards set forth in 18 U.S.C. §§2510-2520. The conclusion of fact by the Petitioner has never been judicially determined and was, in fact, disputed by Respondents at the trial court level.

The Petitioner's factual rendition of the issuance of electronic search warrants on July 2, on the application of the Sedgwick County District Attorney requires closer scrutiny. It is not denied that Judge Calvert made a finding of probable cause to support the issuance of the warrants. It is omitted in the Petitioner's version, however, that the probable cause finding was based upon surveillance, intercepted communications and generally the cumulative information previously gathered including evidence seized under the previous interceptions issued pursuant to the authority of K.S.A. 1974 Supp. 22-2513. *State v. Farha,* 218, Kan. 394, 410, (Petition, App. A27, A28.)

Petitioner states on page 9, paragraph 3 of the Petition that informations were filed against all Respondents on September 12, 1974. For clarification, it should be noted that the Respondents Thompson, Knightley, Cohlmia, Parsons and Christopher were named and charged for the first time although they had been the subject of 1972 interceptions. In December of 1974, the Petitioner dismissed the original complaints filed solely against Hal and Gerald Farha since the original charges were included in the September 12, 1974 information.

B. How the Federal Question Arose

Petitioner's interpretation of the February 20, 1975, ruling (Petition, p. 10) does not fairly and accurately reflect the holding of the lower court. The complete finding of the Court was:

> "On February 20, 1975, the Honorable Nicholas W. Klein, judge of division No. 8 of the Sedgwick County district court, ruled that K.S.A. 1971 Supp. 22-2513 was constitutionally invalid, was deficient also because it did not comply with the procedures required by federal statute and purported to give state officials (assistant attorneys general) broader author-

> ity in seeking an electronic search warrant than was permissible under 18 U.S.C. §2510 et seq. The court suppressed the evidence obtained under all the warrants issued before July 1, 1974. It further found that the July 2, 1974, warrant issued pursuant to our present state statutes (K.S.A. 22-2514, et seq. [Weeks 1974] was 'fatally tainted' by the illegally obtained evidence under the prior warrants. The Court suppressed all the evidence derived from the July 2nd intercept and it held that the testimony of witnesses endorsed on the informations filed September 12, 1974, should also be suppressed, subject to establishment by the State that the testimony of any particular witness was not tainted by the defective intercepts. In its suppression order the court found that all defendants were 'aggrieved parties' pursuant to the provisions of 18 U.S.C. §2510, et seq. This appeal by the state ensued." *State v. Farha,* supra, p. 398; (Petition-App., A7-A8)

The Petitioner states in paragraph 2 at page 10 of the Petition that the Supreme Court of Kansas ruled that:

> "Kan. Stat. Ann. 22-2513 was constitutionally defective in that it did not comply strictly to the terms of 18 U.S.C. §§2510-2520."

This incorrectly construes the ruling of the Court. The following more accurately reflects the Kansas Supreme Court's ruling analyzing *Berger v. New York,* 388 U.S. 41, 18 L. Ed. 2d 1040, 87 S. Ct. 1873 (1967):

> "In summary, *Berger* ruled that the New York statute was unconstitutional in at least five respects. These same defects were present in K.S.A. 1971 Supp. 22-2513, and therefore its provisions must be deemed violative of the fourth amendment.
>
> "It would appear that at the same time, as found by the trial court, K.S.A. 1971 Supp. 22-2513 was

also deficient in that in several areas it did not conform to the requirements set forth in 18. U.S.C. 2510, et seq. enacted in compliance with *Berger." State v. Farha,* supra, p. 406; (Petition, App. A21)

The Petitioner, at the conclusion of its statement of the case, states that the Court held that K.S.A. 1971 Supp. 22-2513 was defective because it permitted any Assistant Attorney General to make application for electronic search warrants in conflict with 18. U.S.C. §2516(2). (Petition, p. 11) In addition to the remarkable unconstitutional similarities between K.S.A. 1971 Supp. 22-2513 and the statute found unconstitutional in *Berger,* supra, the Kansas Court found that K.S.A. 1971 Supp. 22-2513 did not meet the Federal minimum standards as set forth in 18 U.S.C. §2510, et seq. in the foregoing respect and in at least five other areas. The findings are painstakenly detailed in the opinion of *State v. Farha,* supra, at pages 404-409. (Petition, App. A21-A27).

The question of the oral authorization of the Attorney General to an Assistant Attorney General (Petition, p. 11) was not considered by the Court. The Kansas Court declined to consider the legitimacy or sufficiency of the alleged delegation by the Attorney General. Said the Court:

> "It is true the record on appeal contains an affidavit dated March 21, 1975, indicating prior review and approval of the Shawnee County application by the attorney general. In *In re Olander,* supra, we declined to consider like evidence offered to shore up the county attorney's delegation power. Without in any way impugning the integrity of the affidavit in the case at bar, we do not think delegation of state authority to apply for wiretaps in this fashion comports with congressional intent." *State v. Farha,* supra, p. 404, (Petition, App. A17)

ARGUMENT

AN UNCONSTITUTIONAL STATE STATUTE MAY NOT BE TREATED AS AN ENABLING ACT AUTHORIZING STATE OFFICIALS TO APPLY TO STATE COURTS FOR ELECTRONIC INTERCEPTION SEARCH WARRANTS PURSUANT TO 18 U.S.C. §§2510-2520.

The argument advanced by Petitioner that K.S.A. 1971 Supp. 22-2513 (repealed and superseded by K.S.A. 1974 Supp. 22-2514 et seq., effective July 1, 1974) may be treated as an enabling statute is raised by Petitioner for the first time in the Petition. Respondents submit that this position is wholly without merit. Petitioner does not contend that the Kansas Supreme Court is wrong in finding that the statute failed to comply with the minimum standards set forth in 18 U.S.C. §§2510-2520, or that the statute in question is constitutional. Petitioner does claim the interpretation of the Kansas Supreme Court is too narrow in one respect. Stripping the position of the Petitioner to its bare bones, the argument is that though the Kansas statute is unconstitutional, it is a sufficient enabling act to allow an application for the interception of wire or oral communications to be made under 18 U.S.C. §2516(2). To illustrate the folly of Petitioner's position, all that is necessary to do is to include the word "unconstitutional" within the provisions of part of 18 U.S.C. §2516(2) so that it reads in part:

> ". . . may apply to such judge for, and such judge may grant in conformity with §2518 of this chapter and with the applicable [unconstitutional] state statute . . ." (Unconstitutional added.)

To state this position of Petitioner is to effectively refute it. The obvious congressional intent has been fully explored in a number of cases. All illustrate that a state is free

to adopt restrictions on the issuance of the interception of wire or oral communications which are more restrictive than the Federal statute, but may not be less so. *In re Olander,* 213 Kan. 282, 515 P.2d 1211 (1973); *People v. Conklin,* 114 Cal. Rptr. 241, 522 P.2d 1049 (1974), 419 U.S. 1064, 42 L. Ed 2d 661, 95 S. Ct. Rptr. 657 (1974). (App. dis. for lack of a substantial Federal question); *Halpin v. Superior Court,* 6 Cal. 3d 885, 101 Cal. Rptr. 375, 495 P.2d 1295, *cert. den. sub nom; California v. Halpin,* 409 U.S. 987, 34 L. Ed. 2d 246, 93 S. Ct. 318. Congressional intent is clearly set forth in *Senate Report 1097, 1968 U.S. Code Cong. and Admin. News,* page 2187, in explaining the legislative thinking:

> "No applications may be authorized unless a specific state statute permits it. The state statute must meet the minimum standards reflected as a whole in the proposed chapter. The proposed provision envisions that the states will be free to adopt more restrictive legislation, or no legislation at all, but not less restrictive legislation."

The law of the State of Kansas is in accord with this express intent:

> "The limitations set by the federal statute are to be observed by state authorities, but we do not understand that a state is prohibited from imposing even more restrictive requirements than are set out in the federal law." *In re Olander,* supra, p. 286.

Moreover, Petitioner overlooks the principle of law that an unconstitutional statute is void from its inception. In *Norton v. Shelby County,* 118 U.S. 425, 30 L. Ed. 178, 6 S. Ct. 1121 (1886), this Court stated the principle in the following language:

> "An unconstitutional act is not a law, it confers no rights; it imposes no duties; it affords no protections; it creates no office; it is, in legal contempla-

> tion, as inoperative as though it has never been passed." 30 L. Ed. 178, 186. See also *Chicago I.L.R. Co. v. Hackett,* 228 U.S. 559, 57 L. Ed 966, 33 S. Ct. 581 (1913); *Linkletter v. Walker,* 381 U.S. 618, 14 L. Ed. 2d 601, 85 S. Ct. 1731 (1965); *Robinson v. Neil,* 409 U. S. 505, 35 L. Ed. 2d 29, 93 S. Ct. 876 (1973); *Felix v. Wallace County,* 62 Kan. 832, 62 Pac. 667 (1900).

In summary, it should be noted that Petitioner neither claims the Kansas Supreme Court to be wrong in declaring unconstitutional the statute in question, nor that it fails to meet minimum standards of 18 U.S.C. §2510, et seq. The Petitioner fails to recognize that the responsibility of the state is to enact standards at least as rigid, if not more so, than the Federal statutes governing interception of oral or wire communications. The Petitioner does not contend, nor can it be said, that the Kansas statute in question fails to meet even the most minimal Federal standards. Finally, the statute upon which Petitioner relies as an enabling statute is under law void *ab initio;* having no effect, it is a nullity that cannot be used for any purpose whatsoever. *Chicago I.L.R.Co. v. Hackett,* supra, 57 L. Ed. 966 at 969.

AN UNCONSTITUTIONAL STATE STATUTE DOES NOT AUTHORIZE ORAL DELEGATION BY A STATE ATTORNEY GENERAL TO AN ASSISTANT ATTORNEY GENERAL TO APPLY TO A STATE COURT FOR AN ELECTRONIC SEARCH WARRANT.

Petitioner has attempted to raise an issue that was not actually decided by the Kansas Supreme Court. The decision of the Kansas Court, in part, held that K.S.A. 1971 Supp. 22-2513(1) was more permissive than 18 U.S.C. §2516(2) in that it purported to authorize an Assistant Attorney General to make application for a wiretap order and was therefore invalid as in conflict with the Federal

Act. *State v. Farha,* supra, 218 Kan. 394 at 404, (Petition, App. A17). The issue was not whether the alleged oral delegation from the State Attorney General to an Assistant Attorney General was proper, but whether the state statute was too broad and therefore in conflict with the Federal Act and, further, whether the state statute was constitutional. On the latter issue, the Court found the Kansas statute deficient in five respects, none of which are challenged. In addition to the constitutional deficiences the Kansas Court found conflict between the Kansas statute and Title III in six (6) areas. *State v. Farha,* supra, pp. 404-409, (Petition, App. A21-A26). In judging the Kansas statute by the standards set forth in *Berger v. New York,* supra, the Court stated:

> "First. '. . . eavesdropping is authorized without requiring belief that any particular offense has been or is being committed; nor that the 'property' sought, the conversations, be particularly described.' . . .
>
> "Although our statute provided that the applicant for a wiretap order state the crimes under investigation, this did not mean that the applicant must state his belief that any particular crime has been or is being committed. . . .
>
> "Second, the court found that the New York statute authorized eavesdropping for a two-month period, which amounted to '. . . a series of intrusions, searches, and seizures pursuant to a single showing of probable cause.' . . . Our statute . . . contained no provision that the order terminate when the first relevant conversation was seized, unless a special showing for a longer period was demonstrated. . . .
>
> "Third, the court said that the New York statute permitted '. . . extensions of the original two-month period — presumably for two months each — on a mere showing that such extension is 'in the public

> interest" . . . the requirements in the Kansas statute for an extension of an eavesdrop order were found unconstitutional in *Berger,* "in that they did not require a present showing of probable cause to justify the extension order.
>
> "Fourth, *Berger* found that the New York statute '. . . places no termination date on the eavesdrop once the conversation sought is seized. This is left entirely in the discretion of the officer.' (pp. 59-60.) Similarly, our statute authorized a general search which continued over the entire period of the order. . . .
>
> " 'Finally, the [New York] statute's procedure, necessarily because its success depends on secrecy, has no requirement for notice as do conventional warrants, nor does it overcome this defect by requiring some showing of special facts. . . .' (p. 60.) K.S.A. 1971 Supp. 22-2513 required a return to be filed with the court three days after the intercept order expired, but it made no requirement that notice of the interception be given the person whose phone was tapped, nor that special facts be shown to obviate the notice requirement." *State v. Farha,* supra, pp. 404-406, (Petition, App. A18-A20).

The statute the Kansas court found unconstitutional was the only authority existing for a State Assistant Attorney General or Attorney General to apply to a state court of competent jurisdiction for authority to eavesdrop. Absent this grant of authority, there was no way to lawfully eavesdrop in the State of Kansas. The Petitioner does not challenge the decision of the Kansas court that the statute is unconstitutional. What Petitioner is in effect asking this Court to do is rewrite the Federal legislation, contrary to the intent of the Congress, to authorize eavesdropping in the State of Kansas in 1972, without a lawful grant of authority.

THIS MATTER IS NOT A PROPER SUBJECT FOR REVIEW BY THE UNITED STATES SUPREME COURT.

The trial court's holding, as pointed out by the Kansas Supreme Court, was that all of the evidence derived from the intercepts be suppressed and, further, that the testimony of the witnesses endorsed on the Information filed September 12, 1974, should also be suppressed, subject to establishment by the State that the testimony of any particular witness was not tainted by the defective intercepts. *State v. Farha,* supra, p. 398, (Petition, App. A7-A8). Inasmuch as the Petitioner has not yet elected to exercise the foregoing remedy mandated by the lower courts, this case is not in the posture of finality as demanded by the decisions of this Court. Whether or not this Court grants or denies certiorari, Respondents still face the specter of further litigation on the unresolved issues by the lower courts. The decision of the Kansas Court is not final in this respect. Petitioner's request places this Court in the position of rendering a decision which will not finally determine the merits of the case. This Court said in *Market Street R. Co. v. Railroad Com. of Cal.,* 324 U.S. 548, 551, 89 L. Ed. 1171, 65 S. Ct. 770 (1975):

> "Our jurisdiction to review a state court judgment is confined by longstanding statute to one which is final. Judicial Code, §237, 28 USCA §344, 8 FCA title 28, §344. Final it must be in two senses: It must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court."

In the more recent case of *North Dakota Pharmacy Bd. v. Snyder's Stores,* 414 U.S. 156, 159, 38 L. Ed. 2d 379, 94 S. Ct. 407 (1973), this Court further stated:

> "The finality requirement of 28 USC § 1257 [28 USCS § 1257] which limits our review of state court judgments, serves several ends: (1) it avoids piecemeal review by federal courts of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real "case" or "controversy" in the sense of Art III; (3) it limits federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs."

Petitioner has invoked the jurisdiction of this Court under 28 U.S.C. §1257(3). However, Petitioner fails to present either the argument that K.S.A. 1971 Supp. 22-2513 is constitutional or that it does not conflict with Federal law. In fact, Petitioner on page 13 of the Petition admits these two findings of the Kansas Court. Respondents submit that Petitioner has failed to establish the jurisdictional prerequisites set forth in 28 U.S.C. 1257(3).

The Petition amounts to nothing more than a request for an advisory opinion. This Court stated in *Herb v. Pitcairn,* 324 U.S. 117, 125, 126, 89 L. Ed. 789, 65 S. Ct. 459 (1945):

> ". . . our only power over state court judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal law, our review would amount to nothing more than an advisory opinion."

There is no claim that this is a question of substantial interest to a great number of persons, or that there are any decisions in conflict throughout the country. Respondents submit that the opinion of the Kansas Supreme Court is

clearly correct and rests on the decision of the Kansas Supreme Court as set forth in the Appendix. Finally, it must be noted that the statute which is under consideration in this case has been repealed effective July 1, 1974. The Kansas legislature, prior to the decision by the Kansas Supreme Court in the instant case, recognized that the 1971 statute was totally deficient and unconstitutional and therefore remedied that by passing the present statutes, which, as the Kansas Court found, "largely track the language of Title III." *State v. Farha,* supra, p. 410, (Petition, App. A27).

CONCLUSION

Petitioner has failed to establish a colorable question for review by this Court. Moreover, the decision of the Kansas Supreme Court is clearly correct and for the reasons set forth in this brief, it is submitted the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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